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No. 92-1810

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

IN RE: MICRO-TIME MANAGEMENT SYSTEMS, INC.,
Debtor,

MICRO-TIME MANAGEMENT SYSTEMS, INC.; OTIS KIRKLAND, Individually and on behalf of all other Creditors, (91-2261),
Plaintiffs,

and

CREDITORS OF MICRO-TIME MANAGEMENT SYSTEMS, INC., (91-2260),
Plaintiffs-Petitioners,

v

ALLARD & FISH, P.C.; DAVID W. ALLARD, JR.; and DEBORAH L. FISH, Jointly and Severally,
Defendants-Respondents,

ALLARD & FISH, P.C.; DAVID W. ALLARD, JR., and DEBORAH L. FISH,
Third-Party Plaintiffs,

v

LAWRENCE J. STOCKLER AND ASSOCIATES, P.C.; LAWRENCE J. STOCKLER, Jointly and Severally; SCHAFER & WEINER, P.C.; ARNOLD S. SCHAFER, INDIVIDUALLY, Jointly and Severally,
Third-Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER LAWRENCE STOCKLER'S PETITION HAS ANY VALIDITY OR LEGITIMACY INDEPENDENT OF THE PETITION FILED BY THE ACTUAL PLAINTIFFS IN THIS CASE; WHETHER "THE CREDITORS" ARE PARTIES TO THIS ACTION; AND WHETHER STOCKLER REPRESENTS THEM OR HAS STANDING TO PURSUE A PETITION ON THEIR BEHALF?

II.

WHETHER THE TWO ALLEGED CONSTITUTIONAL ISSUES WHICH WERE NOT PRESENTED TO OR RULED ON BY THE COURTS BELOW ARE PROPERLY BEFORE THIS COURT?

III.

WHETHER THIS PETITION SHOULD BE GRANTED WHERE STOCKLER HAS NOT ILLUSTRATED ANY INTER-CIRCUIT CONFLICT, AN IMPORTANT ISSUE OF FEDERAL LAW, A CONFLICT WITH A DECISION OF THIS COURT, OR ANY OTHER SPECIAL OR IMPORTANT REASON JUSTIFYING A WRIT OF CERTIORARI?

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS AND JUDGMENTS DELIVERED BY THE COURTS BELOW

Respondents are dissatisfied with the presentation of this item in Petitioner's Petition. In particular, the "courts below" in this independent adversary proceeding are the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan, Southern Division. Petitioner has included the opinions and judgments of

those courts as Appendix items 1a, 1b, and 1d. However, the Memorandum Opinion and Order entered in the Chapter 11 bankruptcy proceeding relative to Micro-Time Management Systems, Inc. by the United States District Court, Eastern District of Michigan, Bankruptcy Court (attached by Petitioner as Appendix item 1c) is not an opinion or judgment of a court below in this independent adversary proceeding, and it was not a subject of the appeal of this independent adversary proceeding to the Sixth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS

Respondents are dissatisfied with the presentation of this item in Petitioner's Petition. In particular, neither the constitutional provision relative to due process nor the constitutional provision relative to the right to trial by jury, or any arguments relative to either, were presented to either the district court or the Sixth Circuit Court of Appeals, nor were either of those constitutional issues ruled on by either court below. Therefore, neither the constitutional arguments and the constitutional provisions relative thereto, are properly before this Court.

COUNTER-STATEMENT OF THE CASE

This Counter-Statement of the case is necessary to correct inaccuracies and omissions in the statement of the case by petitioner.

I.

INTRODUCTION

On May 4, 1989, the United States District Court for the Eastern District of Michigan Bankruptcy Court

entered an order confirming the debtors' third amended plan of reorganization (Exhibit I to R32) relative to the Chapter 11 bankruptcy of Micro-Time Management Systems, Inc. ("MTMS"). MTMS and its president, Otis Kirkland, subsequently filed this independent adversary proceeding alleging, in essence, legal malpractice by the trustee's attorney during the course of the bankruptcy proceedings prior to the confirmation of the plan.

The adversary proceeding was removed from the bankruptcy court to the district court, which dismissed the Complaint based on the *res judicata* effect of the final adjudication of the bankruptcy proceedings through the order confirming the debtors' third amended plan of reorganization.

MTMS and Otis Kirkland appealed and the Sixth Circuit affirmed. MTMS and Otis Kirkland have filed a petition for writ of certiorari with the United States Supreme Court which has been docketed as #92-1897. Although MTMS and Otis Kirkland are the only Plaintiffs to this action, and they have filed their own petition to this Court, Lawrence Stockler ("Stockler") has filed this petition purportedly on behalf of "the Creditors of MTMS".

"The Creditors of MTMS" are not now, and have never been, parties to this independent adversary proceeding. This independent adversary proceeding was filed by MTMS and Otis Kirkland "individually and on behalf of all other creditors". However, contrary to the procedural rules applicable to adversary proceedings (Bankruptcy Rules 7017-7025), no individual creditor, group of creditors, or class of creditors ever perfected any potential party standing.

As the Creditors are not parties to this action, and neither Stockler nor his law firm are parties (other than

as third-party defendants on a third-party complaint which was not the subject of the appeal to the Sixth Circuit) and as Otis Kirkland, even in his "representative" capacity "on behalf of all other creditors", is currently pursuing his own petition to this Court, and as the Sixth Circuit Court of Appeals completely disposed of Stockler's "creditors" appeal to that Court on threshold standing grounds in a footnote in its opinion, Stockler's Petition to this Court, purportedly on behalf of "the creditors", is not in compliance with the most basic procedural rules.

II.

INACCURACIES IN THE PETITION.

In his statement of the case, Stockler essentially concedes all the relevant facts as set forth in the Sixth Circuit opinion except one; that "the creditors" had pre-confirmation knowledge of the alleged cause of action against Allard & Fish. Stockler implies at page 3 that the creditors were not made aware of the alleged conflict of the trustee and the corresponding alleged cause of action against Allard & Fish. However, as noted in the Sixth Circuit opinion, the *record* reflects that prior to the confirmation of the plan of reorganization, MTMS, Otis Kirkland, the MTMS bankruptcy attorney, the bankruptcy court, the United States Trustee's Office, and the unsecured creditors committee had knowledge of the alleged conflict and thus the alleged cause of action against Allard & Fish.

It is vital for this Court to note that the issue of such widespread knowledge was not controverted at the district court level. As supported by exhibits to the Allard & Fish motion to dismiss, the record contained extensive support for this widespread knowledge, including knowledge by the creditors committee. Stockler merely

argued in the Sixth Circuit, without any factual or evidentiary support by way of documents, affidavits, or any other evidence, that "the creditors", (apparently all 370 of them) did not have any knowledge of the alleged conflict and the alleged cause of action against Allard & Fish. Confirming the lack of evidentiary support, Stockler's petition does not reference any record item in support of this alleged lack of knowledge.

However, for purposes of this Court's consideration of this petition for writ of certiorari, Stockler's entire petition rests on that one factual issue for which Stockler has not, and does not now, present any evidentiary support.

A second primary inaccuracy in the statement of the case is the reference to documents, transcripts and events in the bankruptcy proceeding which never became part of the record in this independent adversary proceeding and were not part of the record on appeal to the Sixth Circuit.

Both Stockler and MTMS/Kirkland continuously attempted to expand the record on appeal and during the pendancy of the Sixth Circuit appeal MTMS and Kirkland filed a motion in the district court to include the entire bankruptcy record in the record on appeal. In the instant petition, Stockler continues his attempt to expand the record on appeal. Stockler's petition references and quotes from an August 14, 1990 transcript from the Bankruptcy Court (pp. 6-7, 13-15, n.1), references and quotes from a September 16, 1991 district court opinion regarding a fee application (pp. 10, 24-25, 39-40) and quotes from a transcript of a December 17, 1990 Bankruptcy Court hearing (p. 21, n. 3). None of these references provide a citation to the record in this independent adversary proceeding because they did not become part of the *record* in *this* case.

III.

OMISSIONS FROM THE PETITION (FACTS RELATIVE TO THE ISSUE OF STOCKLER'S AND/OR "THE CREDITORS"' STANDING.)

More important than the above-mentioned inaccuracies is the omission from Stockler's petition of facts relative to the threshold standing issue upon which the Sixth Circuit disposed of Stockler's appeal.

It is vital to understand that "the Creditors" of MTMS have never been parties to this action either individually or collectively. The original adversary proceeding Complaint caption referred to Otis Kirkland as appearing both "individually and on behalf of all other Creditors".

However, neither Stockler, any party to this action, nor the Court, ever took any steps to actually include any creditor as a party to this action. Otis Kirkland was the principal of the debtor, its sole shareholder and a subordinated creditor with a status equivalent to an equityholder to be paid dividends only if all other creditors were paid in full. No class action procedure, or any other procedure was implemented to include any individual creditor or group or class of creditors.

The only Plaintiffs to this action, MTMS and Otis Kirkland, *both "individually and on behalf of all other creditors"* are petitioners in Supreme Court #92-1987. That petition necessarily includes any petition by "the creditors" (as "represented" by Kirkland) if they are involved in some way in this case (which is denied).

Furthermore, even if the creditors were involved, Stockler could not represent them due to his status as a third party defendant and an unappealed order in the district court by which Stockler withdrew, which order did not reserve for him *any* representative capacity.

(R 29.) The Allard & Fish Defendants[1] filed third-party Complaints against various third-party Defendants, including Lawrence J. Stockler and his law firm. Stockler filed a motion to withdraw as counsel for all Plaintiffs (R 14) one month later on April 4, 1991. The court granted the motion and the order (R 29) did not reserve *any* representative capacity for Stockler.

After Lawrence Stockler filed his motion to withdraw, but before the order granting the motion was entered, Ken Graham filed an appearance (R 21) on behalf of *all* the Plaintiffs. Accordingly, even if the "creditors" were involved in the lawsuit as parties (which is denied and which is confirmed by the docket sheet and every relevant pleading in this matter), by either their designation as a *potential* class, or otherwise, then Ken Graham had entered his appearance for MTMS, and Otis Kirkland both individually or as a representative of a potential class of creditors.

The District Court granted Stockler's motion to withdraw by Order dated May 24, 1991. As the District Court docket sheet indicates, Stockler did not file any pleading as an attorney for any party or alleged party from the date of the entry of the Order of Withdrawal (May 24, 1991) (R 29) until September 21, 1991[2]. On that date he filed a response to the Allard & Fish Defendants' Motion for Summary Judgment on the primary Complaint,

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[1] **Respondents, the Allard & Fish Defendants, disclose that there are no parent or subsidiary companies of which this Court should be aware pursuant to Supreme Court Rule 29.1.**

[2] **The document filed by Lawrence Stockler on July 10, 1991 (R 30), was a supplemental memorandum (or more properly, a reply brief) regarding Lawrence Stockler's motion for summary judgment on the third-party Complaint filed by Allard & Fish against Lawrence Stockler. This was a document being filed on behalf of Lawrence Stockler as a third-party Defendant and was not a document which purported to be on behalf of "the creditors".**

which response was purported to be on behalf of "the creditors". (R 38-42.) However, Ken Graham, on behalf of *all* Plaintiffs, had already filed a response to the Allard & Fish Defendants' Motion for Summary Judgment on September 13, 1991. (R 37.)

Allard & Fish then responded by way of objections and a request to strike the pleadings filed by Lawrence Stockler allegedly on behalf of the creditors. (R 43.)

Despite being on notice of the Allard & Fish Defendants' position that the Court had ordered the complete, unqualified withdrawal of Lawrence Stockler as an attorney in this case, and despite the fact that the creditors were not parties to this action, neither the Court, Lawrence Stockler, any attorney in this action, the Creditors Committee, any creditor (either collectively or individually), MTMS, nor Otis Kirkland (either individually or "on behalf of the creditors") took any step whatsoever to include any individual creditor or group of creditors as a party in this action.

The court then entered its Order granting the Allard & Fish Defendants' motion for summary judgment as to the primary Complaint, which effectively disposed of the entire case and all the third-party complaints and counter-claims. (R 45-46.)

Stockler then attempted to file a late motion for reconsideration (R 47) which was denied and then filed an appeal (91-2260) (R 54) to the Sixth Circuit Court of Appeals, purportedly on behalf of "the creditors".

The actual Plaintiffs in this matter including any *potential*, yet unperfected, class of creditors as represented by Otis Kirkland, then filed their claim of appeal. (R 59.)

The two appeals progressed on independent briefing schedules in the Sixth Circuit. Lawrence Stockler filed

his Appeal Brief in his appeal (91-2260) and interestingly, the Disclosure of Corporate Affiliations and Financial Interest identified "Lawrence J. Stockler" as the *party* on whose behalf the brief was being filed, and indicated *his* disclosure of corporate affiliations and financial interests.

Stockler's appeal brief, like the instant petition, failed to address the threshold standing issues with regard to party status of "the creditors", failed to address Stockler's capacity to represent them, and failed to establish the independent validity of Stockler's "creditors" appeal in relation to the appeal filed by MTMS and Otis Kirkland both individually and "on behalf of all other creditors".

Allard & Fish then filed their appeal brief which extensively discussed the threshold standing issues. Stockler then filed a reply brief which again did not address those issues and did not provide any support for Stockler's independent "creditors" appeal.

Allard & Fish then filed a motion to dismiss based on lack of jurisdiction as well as a motion for costs and attorneys fees pursuant to F.R.A.P. 38. Stockler's response to both the motion to dismiss and the motion for costs and attorneys fees, and the respective briefs in support of each, again did not provide any factual or legal support for the independent validity of the "creditors" appeal, any party status on behalf of "the creditors", or Stockler's capacity to represent any creditor or group of creditors.

Although the Sixth Circuit Court of Appeals denied both the motion to dismiss and the motion for costs and attorneys fees, the Court of Appeals completely disposed of Stockler's "creditors" "appeal" in a short footnote in the per curiam opinion disposing of both

Stockler's "appeal" and the appeal by the actual Plaintiffs, which opinion affirmed the district court's dismissal of the adversary proceeding.

Both Stockler and the actual Plaintiffs then filed motions for rehearing which were denied. In Stockler's motion for rehearing, he raised, for the first time in these proceedings, a claim that the unfavorable result with regard to his "creditors" "appeal" violated the due process rights of the creditors. The Sixth Circuit Court of Appeals properly rejected Stockler's tardy attempt at raising this constitutional issue.

IV.

OMISSIONS FROM THE PETITION (FACTS RELATIVE TO CONSTITUTIONAL ISSUES.)

Stockler's petition suggests that constitutional issues are involved. Specifically, Stockler argues that the rulings below violated the creditors' due process rights and right to a trial by jury. In the course of all the proceedings below, the right to a jury trial issue has never been raised or presented by either Stockler or the actual Plaintiffs, nor has that issue been ruled on by the Courts below. The reference to that issue in Stockler's petition is the first reference to that issue in the course of these proceedings.

With regard to the due process issue, Stockler first raised that issue in his motion for reconsideration in the Sixth Circuit Court of Appeals at page 7, ¶ 5. The constitutional issue raised for the first time in a motion for reconsideration to the Sixth Circuit Court of Appeals was, of course, late and does not act to preserve that issue for purposes of a petition to the Supreme Court.

Accordingly, neither the due process issue nor the jury trial issue was presented by Stockler in any of the

proceedings below. In particular, neither argument appeared in Stockler's appeal brief, reply brief on appeal, answer to motion to dismiss and brief in opposition to motion to dismiss, the answer to the motion for costs and attorneys fees or the brief in opposition to the motion for costs and attorneys fees.[3]

V.

INACCURACIES AND OMISSIONS FROM THE PETITION (FACTS RELATIVE TO WHETHER STOCKLER'S PETITION PRESENTS ISSUES WHICH WOULD JUSTIFY A WRIT OF CERTIORARI.)

Stockler's petition presents essentially four arguments; however, he misstates or omits facts relative to each. First he presents the constitutional issues which, as indicated above, were not properly preserved for appeal to this Court.

Second, he argues that any claim by the creditors against Allard & Fish are independent of any claims by MTMS and Kirkland against Allard & Fish. The Court of Appeals never was required to address this issue because it disposed of Stockler's appeal on the ground that Stockler did not represent any party to the action and the Court ruled that any claim by any creditor against Allard & Fish based on the representation of the trustee would be barred by *res judicata*.

Third, Stockler argues that a trustee's attorney owes certain duties to the creditors in a bankruptcy proceeding. The issue of whether duties were owed was

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[3] **In the brief in opposition to the motion for costs and attorneys fees, at pages 17 through 19, Stockler raises a constitutional issue but it is limited to arguing that "due process requires that sanctions not be imposed without a full evidentiary hearing." That is not the same due process issue that Stockler raises in the instant petition.**

never addressed by either of the courts below in this independent adversary proceeding. The matter was disposed of on the threshold issue of the *res judicata* affect of the order confirming the plan of reorganization.

Fourth, Stockler argues that the creditors had no pre-confirmation knowledge of the alleged cause of action against Allard & Fish. This was the primary factual issue upon which the district court and the Sixth Circuit resolved the *res judicata* issue. Neither Stockler (purporting to represent the creditors) nor MTMS, nor Kirkland (both individually and as an alleged representative of all other creditors) controverted the fact established by the Allard & Fish motion to dismiss that not only the debtor and the unsecured creditors committee but also the court, the United States Trustee's Office and MTMS bankruptcy counsel had pre-confirmation knowledge. Therefore, both the district court and the Sixth Circuit properly resolved this factual issue. Stockler does not cite to any items in the record supporting his argument on the knowledge issue and does not illustrate how the courts below erred in deciding the issue.

Essentially, Stockler therefore again ignores the threshold standing issue upon which the court below disposed of his appeal. The Sixth Circuit correctly held that Stockler did not represent any party to this action. Stockler's petition avoids this issue and addresses issues that the courts below either properly decided (the existence of pre-confirmation knowledge) or were not required to address due to the disposition on the *res judicata* issue.

SUMMARY OF ARGUMENT

"The creditors", on whose behalf Stockler purports to file this petition, are not now, and have never been, parties to this action. Lawrence Stockler and his law firm are also not parties to the primary complaint in this matter. Lawrence Stockler is subject to an order entered by the district court by which he withdrew from representing any and all parties to this matter. Also, he is a third-party defendant on a third-party claim, such party status prohibiting him from representing any party in this matter.

Therefore, as the Sixth Circuit properly recognized, Stockler does not represent any party or appellant in this matter. Stockler's petition to this Court does not address these fundamental standing issues in any way. Stockler does not illustrate how the Sixth Circuit's ruling on this issue was erroneous, much less that any special or important issue is involved that would justify a writ of certiorari.

Stockler's two constitutional issues were never presented to or ruled on by the courts below and are therefore not properly before this Court.

Stockler does not present any other special or important issues justifying a writ of certiorari. His claim that the creditors did not have pre-confirmation knowledge of the alleged cause of action against Allard & Fish, which argument is set forth to avoid the *res judicata* bar, is unsupported and, in any event, merely presents an issue of what is a party's burden of controverting an issue of fact in response to a motion for summary judgment or dismissal. Stockler does not explain how that issue was erroneously decided, and certainly does not illustrate how that issue presents an inter-circuit conflict, an important issue of federal law, or a decision which conflicts with a decision of the Supreme Court.

Stockler's other arguments relate to issues there were not addressed by the Court's below and are thus not properly before this Court.

REASONS FOR DENYING THE WRIT

I.

LAWRENCE STOCKLER'S PETITION DOES NOT HAVE ANY VALIDITY OR LEGITIMACY INDEPENDENT OF THE PETITION FILED BY THE ACTUAL PLAINTIFFS IN THIS CASE; "THE CREDITORS" ARE NOT NOW, AND HAVE NEVER BEEN, PARTIES TO THIS ACTION; AND IF THEY ARE INVOLVED IN ANY WAY, STOCKLER CANNOT REPRESENT THEM DUE TO HIS THIRD-PARTY DEFENDANT STATUS, A DISTRICT COURT ORDER FOR HIS COMPLETE WITHDRAWAL, AND THE FACT THAT THE CREDITORS, IF INVOLVED, HAVE A PENDING PETITION (92-1897) AND LEGAL COUNSEL (DARWYN FAIR).

Stockler's petition suggests that there are certain constitutional issues and other issues at stake regarding the Sixth Circuit's rejection of his "creditors"' appeal on procedural grounds. The issues Stockler seeks to have this Court consider were never reached by the Sixth Circuit because the Sixth Circuit completely rejected Stockler's standing to even bring an appeal to that Court.

In footnote 1 of the Sixth Circuit opinion in this matter, the Court unanimously held:

> 1. The complaint in this independent adversary proceeding referenced Kirkland as representing "all other creditors *who would seek to participate* in this action", which was the Sixth Circuit's recognition that:
>
> a. The creditors were originally included only as a potential class and not as a party,

b. At the time of dismissal the creditors, either individually or collectively, had not "sought to participate" nor had they become parties, and

c. Therefore whoever represented Kirkland also represented the unperfected, potential class of creditors,

2. Substitute counsel for MTMS and Kirkland represented Kirkland in his individual capacity and in his capacity as a representative of the potential class of creditors,

3. When Stockler withdrew he withdrew from representing MTMS, Kirkland (both individually and as a representative of a potential class of creditors) and the potential class of creditors because the class had not been perfected at the time and no creditor other than Kirkland was a party, and

4. Stockler no longer represented *any* plaintiff or appellant in this case.

Although the Sixth Circuit completely disposed of Stockler's appeal in ruling as outlined above, Stockler's petition to this Court does not illustrate how any of those dispositive rulings were erroneous, much less that they were erroneous for some reason that would justify this Court's issuance of a discretionary writ of certiorari due to the involvement of some special or important issue. Although these fundamental threshold issues are not addressed by Stockler, he implies that the Sixth Circuit erroneously minimized, rejected, and consolidated his appeal with that of the actual plaintiffs. For the reasons set forth below, the Sixth Circuit disposition of his appeal was correct.

The Bankruptcy Rules provide that certain Federal Rules of Civil Procedure apply to adversary proceedings. The Federal Rules of Civil Procedure regarding necessary joinder (F.R.C.P. 19), permissive joinder (F.R.C.P. 20), misjoinder and non-joinder (F.R.C.P. 21), interpleader (F.R.C.P. 22), class actions (F.R.C.P. 23), actions relating to unincorporated associations (F.R.C.P. 23.2), intervention (F.R.C.P. 24) and substitution (F.R.C.P. 25) are made applicable to adversary proceedings by Bankruptcy Rules 7019, 7020, 7021, 7022, 7023, 7023.2, 7024, and 7025, respectively. In addition, F.R.C.P. 17 requiring that actions be prosecuted in the name of the real party in interest is rendered applicable to adversary proceedings by Bankruptcy Rule 7017.

There is no rule that provides that any party involved in a bankruptcy matter has *ipso facto*, by that involvement, become a "party" in an adversary proceeding that is brought based on that bankruptcy or any potential causes of action between any parties involved in the bankruptcy.

Despite the orderly and comprehensive set of civil procedure rules regarding adversary proceedings, neither the Court, on its own initiative, Lawrence Stockler, Ken Graham, Micro-Time Management Systems, Otis Kirkland (either individually or on "behalf of the creditors"), the creditors committee or any creditor either individually or collectively ever sought to utilize any of these rules or procedures to make any other individual creditor, any group of creditors or any class of creditors a party to this action.

Even after Allard & Fish objected in writing (R 43) to Lawrence Stockler's "creditors" response (R 40, 41) to the Allard & Fish motion for summary judgment (R 31, 32) on the ground that the creditors were not parties to the action, no action was taken by anyone, including

Stockler, to attempt to make any creditor or group of creditors parties to this action.

However, despite the lack of any client, and the lack of any court authorized representative capacity, and in fact in direct contradiction to an existing order of the court ordering his unconditional withdrawal as an attorney in this action, Stockler continued to file pleadings in the District Court and then initiated an appeal to the Sixth Circuit and now this petition to the United States Supreme Court.

The lack of a client and lack of any authorized representative capacity on the part of Mr. Stockler is even more striking in light of the fact that all of the actual plaintiffs in this action are currently being represented by counsel and are in fact pursuing their own petition to this Court. If "the creditors" are involved in this action in any way (and that is denied and not supported by the record) then "the creditors" are involved in another pending petition and are represented by counsel (Darwyn Fair).

In attempting to get around these many insurmountable problems, Stockler references in his footnote 2 one irrelevant pleading by the City of Southfield, which sets forth one creditor's lack of an objection to reopening the bankruptcy case, and one alleged phone message note allegedly reflecting an unexplained and unspecified "no objection" to something. This is apparently Mr. Stockler's support for his position that he represents some, or remarkably all 370 creditors. That certainly does not substitute for compliance with the court rules and does not render the creditors (certainly not all 370 of them) parties to this case.

The Sixth Circuit's rejection of Stockler's appeal on these procedural grounds was correct. See, *First Federal*

of Michigan, et al v. *Barrow*, 878 F.2d. 912 (C.A.6, 1989) (unlike this case, in *Barrow* a class of defendant creditors was certified in a trustee's adversary proceeding after the proper procedure of moving to certify the class had been complied with), and *In Re Butler*, 94 BR 433 (Bkrtcy. N.D. Tex., 1989) (the adversary proceeding initiated by the "Creditors Committee" was not being pursued by the "real party in interest" and was therefore dismissed. In so holding, the court held that the individual aggrieved creditors should have filed the adversary proceeding in their individual capacities and sought class certification of the class consisting of all other creditors. 94 BR at 436).

II.

THE TWO ALLEGED CONSTITUTIONAL ISSUES WERE NOT PRESENTED TO OR RULED ON BY THE COURTS BELOW AND ARE NOT PROPERLY BEFORE THIS COURT.

This Court will not consider issues, particularly constitutional issues, that have not been properly preserved by being presented to and ruled on by the courts below. See, *Ellis* v. *Dixon*, 349 U.S. 458; 75 S. Ct. 850; 99 L.Ed. 1231 (1955); *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644; 118 L.Ed.2d 280 (1992) and *Lytel* v. *Household Manufacturing, Inc.*, 494 U.S. 545; 110 S. Ct. 1331; 108 L.Ed.2d 504 (1990).

In this case, the alleged constitutional issue regarding the right to a jury trial was never presented to or ruled on by the courts below.

Stockler did attempt to raise the due process issue in the Sixth Circuit in his motion for rehearing. However, raising new issues, particularly constitutional issues, is not a proper utilization of Federal Rule of Appellate Procedure 40 and the circuit courts of appeal will not con-

sider issues raised for the first time in a motion for rehearing. See, *Bullock* v. *Mumford.*, 509 F.2d 384 (C.A.D.C., 1975); *Jamestown Farmers Elevator, Inc.* v. *General Mills, Inc.*, 552 F.2d 1285 (C.A.8, 1977); *Anderson* v. *Knox*, 300 F.2d 296 (C.A.9, 1962); *Costo* v. *United* States, 922 F.2d 302 (C.A.6, 1990); *United States* v. *Smith*, 781 F2d 184 (C.A. 10, 1986) (petition for rehearing cannot raise an issue previously waived: here failure to raise the constitutional issue waived it), and *Marion Steamshovel Co.* v. *Bertino*, 82 F.2d 945 (C.A.8, 1936) (*Id*).

Stockler's attempt to raise the due process issue in the motion for rehearing to the Sixth Circuit Court of Appeals did not preserve that issue. As neither of Stockler's constitutional issues were properly raised or preserved in the courts below, they are not properly before this Court and those issues are not open for review in Stockler's petition.

III.

STOCKLER HAS NOT PRESENTED ANY OTHER SPECIAL OR IMPORTANT REASON JUSTIFYING A WRIT OF CERTIORARI.

Stockler presents essentially four arguments in his petition. First, the constitutional issue, as discussed above, is not properly before this Court.

Second, he argues that any creditors claim against Allard & Fish would be independent of any claim by MTMS and Kirkland against Allard & Fish. First, that was not the basis upon which the Sixth Circuit disposed of Stockler's appeal, and in fact neither court below even addressed that issue. The Sixth Circuit, however, noted that any claim based on alleged errors or omissions of Allard & Fish during the bankruptcy proceeding filed by either the debtor or the creditors would be barred by *res judicata*. Finally, Stockler does

not illustrate how this issue presents any inter-circuit conflict, involves an important issue of federal law, or that the Sixth Circuit ruled on that issue contrary to some decision of the Supreme Court.

Third, Stockler argues that a trustee's attorney owes certain duties to the creditors in a bankruptcy proceeding. Again, that issue was not addressed by either court below and did not form the basis of the disposition of Stockler's appeal. The courts below held that *res judicata* would apply regardless of the merits of any claim by the debtors or creditors against Allard & Fish. Further, Stockler does not illustrate how this issue presents an inter-circuit conflict, an important issue of federal law, or a conflict with a decision of the Supreme Court.

Fourth, Stockler argues that the creditors had no pre-confirmation knowledge of the alleged cause of action against Allard & Fish. This was the factual basis on which the Sixth Circuit ruled that both MTMS and Kirkland, and parenthetically any creditor or group of creditors, had knowledge of the alleged cause of action against Allard & Fish prior to the confirmation. The record in this case reflects that the Allard & Fish motion was well supported with regard to that factual issue of knowledge, and moreover that neither MTMS/Kirkland nor Stockler controverted that factual issue in response to the motion. Furthermore, this factual issue, or the legal issue of a party's burden in controverting an issue of fact in response to a motion for summary judgment is not an issue that presents an inter-circuit conflict, an important issue of federal law, or an issue which conflicts with a decision of the Supreme Court.

Finally, even though Stockler completely ignores the issue, the basis for the Sixth Circuit disposition of his

appeal (Stockler has no client, the creditors are not parties to this action, and in any event Stockler could not represent them) does not present an issue of an inter-circuit conflict, an important issue of federal law, or a decision which conflicts with a decision of the Supreme Court.

The disposition of the appeal in the Sixth Circuit affirming the dismissal based on *res judicata* was entirely proper. It was proper even if the creditors were somehow involved in this matter. Any claim by the creditors against Allard & Fish would be subject to *res judicata* just as any claim by MTMS/Kirkland was subject to *res judicata*. See, *Stoll* v. *Gottlieb*, 305 U.S. 165; 59 S. Ct. 134; 83 L.Ed. 104 (1938); *Sanders Confectionary Products, Inc.* v. *Heller Financial, Inc.*, 973 F.2d 474 (C.A.6, 1992), *cert. den.*, 113 S.Ct. 1046; 122 L.Ed.2d 355 (1993), *rehearing denied*, 113 S. Ct. 1628; 123 L.Ed.2d 186 (1993); *In Re El San Juan Hotel Corp.*, 841 F.2d 6 (C.A. 1, 1988); *Met-L-Wood Corp.* v. *Pipin*, 861 F.2d 1012 (C.A.7, 1988), *cert. den.*, 490 U.S. 1006 (1989).

CONCLUSION

For all the foregoing reasons, respondents Allard & Fish, P.C., David W. Allard, Jr. and Deborah L. Fish, respectfully request that this Honorable Court deny Stockler's Petition for Writ of Certiorari.

Respectfully submitted,

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